



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 3, 1998

The Honorable Jerome Aldrich
Criminal District Attorney
Brazoria County
111 East Locust, Room 408A
Angleton, Texas 77515

Letter Opinion No. 98-117

Re: Whether wading across or standing upon
artificially submerged coastal land to fish
constitutes criminal trespass (RQ-1038)

Dear Mr. Aldrich:

You have asked this office whether persons who wade on a particular plot of subaqueous private property to fish are committing criminal trespass. We conclude that, while standing or walking upon submerged land may constitute "entry" for the purpose of section 30.05 of the Penal Code, *see* Letter Opinion No. 97-079 (1997), since one's whole body has intruded upon the property, no Texas case law of which we are aware directly considers the question of whether the right to fish in waters flowing over submerged private property includes a right to wade in those waters for that purpose. Courts in other jurisdictions have considered this question; their answers, however, have varied. *See, e.g., Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 26 (Mo. 1954) (submerged land "public highway for travel and passage by floating and by wading," such wading no trespass); *contra Day v. Armstrong*, 362 P.2d 137, 146 (Wyo. 1961) (wading or walking on private stream bed, except as incidental to right of floating use of water "remains an unlawful trespass"); *see generally* Charles C. Marvel, Annotation, *Public Rights of Recreational Boating, Fishing, Wading, or the Like in Inland Stream the Bed of Which is Privately Owned*, 6 ALR 4th 1030 (1981). Given the paucity of Texas case law on this issue, and the fact that precedents from other jurisdictions are in conflict, we cannot determine with certainty how a Texas court would rule upon the matter.

As you explain the instant case, the property about which you ask is submerged as a result of the construction of a levee in 1963 or 1964. You assume that the submerged land remains the property of the persons in question, though you characterize the waters as "tidal water" and concede that "fishermen can take a boat on the tidal water to fish." Assuming that the landowners do own the submerged land, you ask whether wading to fish, as distinct from fishing from a boat, constitutes trespass.¹

¹This office does not find facts in the opinion process, and cannot gainsay your assumption. However, we note that in *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App.--Austin 1981, writ ref'd n.r.e.), the Court of Appeals held that "title to land covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits is in the State, and such lands constitute public property that is held in trust for the use and benefit of all the people....The dividing line between State ownership of the Bay and private ownership of the upland is the line of mean high tide for

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As a letter opinion issued by this office last year points out, it is well-settled under Texas law that "boating in public waters is not a trespass, even though such waters may flow over submerged private property." Letter Opinion No. 97-079 (1997) at 1. "It is equally well-established that 'the right to enjoy the water does not give the public the right to trespass on the property itself to gain access to the water.'" *Id.*

In Letter Opinion No. 97-079, the Texas Parks and Wildlife Department asked this office whether a series of hypothetical situations involving boaters might constitute criminal trespass. In each of these situations, less than the whole body of the supposed trespasser intruded upon the private property. Relying upon the definition of "entry" in section 30.05(b) of the Penal Code, the letter opinion found that such circumstances did not constitute criminal trespass.

You suggest that in the instant case the definition of "entry" is satisfied, as it was not in Letter Opinion No. 97-079. We concur. Presuming the land one wades upon to be privately owned, clearly the act of wading requires the intrusion of the whole body, and thus satisfies section 30.05(b).

This does not end the inquiry, however. While it would appear, again presuming that the land owners do own the submerged land, that the situation you have described fits the requirements of the trespass statute, the question remains whether the public, in lawful use of its right to fish, has some sort of easement on the submerged land for wading purposes.

There is, as we have said, little Texas authority directly on point, and the other jurisdictions which have considered the matter are divided. Thus, the Missouri Supreme Court has held that a privately-owned stream bed under public waters is "a public highway for travel and passage by floating and by wading." *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 26 (Mo. 1954). On the other hand, the Wyoming Supreme Court has held wading or walking upon a private stream bed a trespass. *Day v. Armstrong*, 362 P.2d 137, 146 (Wyo. 1961).

There is, we note, an opinion of this office holding that it is no trespass for the public to walk down a dry or submerged river bed privately owned by virtue of the Small Bill. *See* Attorney General Opinion S-208 (1956). This opinion is, however, factually distinguishable from the case you raise, since it is concerned with stream beds. In the absence of controlling Texas precedent preventing it, the decision as to whether to prosecute acts that appear to come within the scope of section 30.05 of the Penal Code is within your discretion. However, absent such precedent on the specific issue of

¹(...continued)

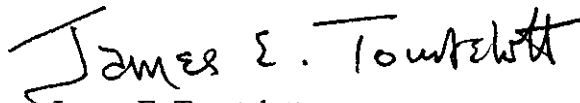
patents issued after 1840." (Citations omitted). (For discussion of the relevant principles concerning acquisition and loss of title to shoreline property, *see, e.g. Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (Tex. App.--Corpus Christi 1993, writ denied); *Coastal Indus. Water Auth. v. York*, 520 S.W.2d 494 (Tex. Civ. App.--Houston [1st Dist.] 1975), *aff'd*, 532 S.W.2d 949 (Tex. 1976). Ownership is an element of the offense of criminal trespass which must be pled and proved. *See Johnson v. State*, 665 S.W.2d 554, 556 (Tex. App.--Houston [1st Dist.] 1984, no writ).

whether the right to fish in the waters in question includes as a necessary incident the right to wade, this office cannot predict what a Texas court will hold as to whether such wading is a trespass.

SUMMARY

While wading upon privately-held land beneath public waters constitutes "entry" within the meaning of section 30.05(b) of the Penal Code, the question of whether wading upon privately-owned coastal upland submerged by dredging in order to fish there constitutes trespass does not appear to be settled under Texas law.

Yours very truly,

A handwritten signature in black ink, reading "James E. Tourtelott". The signature is written in a cursive, slightly stylized font. The first name "James" is written with a large, sweeping initial "J". The last name "Tourtelott" is written with a prominent "T" and a long, horizontal stroke extending to the right.

James E. Tourtelott
Assistant Attorney General
Opinion Committee